the defendant, who has by his wrong forced the plaintiff into the strait of proving damages, cannot complain that the latter wishes to use the best methods left him for accomplishing the result.[19]

The court, in *Turpin* v. *Jones*, suggested that the plaintiff wait until after the season's crop was grown, and then renew his action. And on its face the suggestion seems eminently sensible. Far better evidence would then be available, both as to the value of the crop and as to the plaintiff's earnings in other employments. By the original contract, he did not contemplate any compensation until that time. Furthermore, while the measure of damage is usually considered a matter of substantive law,[20] the admission of evidence and the computation of the amount of damage are purely matters of procedure.[21] Courts frequently, in their discretion, suspend a trial or an inquiry for the assessment of damages for a reasonable time, until evidence not then on hand becomes available.[22] But one must proceed carefully. If this is entirely a matter of evidence, it must be recognized as such, and may be dealt with through the proper medium of a continuance or a postponed assessment of damages. It may do very well to postpone the trial in this way, but the plaintiff should not be required to bring an entirely new suit.[23] To deny a remedy for established rights, as did the Kentucky court, is to exercise a jurisdiction closely analogous to that usurped by the English Chancellor in the course of the seventeenth century, at a time when there was a real need for a softening liberality in applying the rules of the strict law. With the growth of equity and modern legal procedure, that time has passed. We are here in a court of law, where certain legal results are supposed to follow upon the establishment of a certain set of facts. To extend the discretion of the judge from evidence into substance would be a far-reaching and inherently dangerous change.

EFFECT OF AN ORAL DIRECTION TO A DEBTOR TO PAY THE DEBT TO A DONEE AT THE CREDITOR'S DEATH. — It is probably a common transaction, particularly where the parties are all members of the same family, for a creditor orally and gratuitously to direct his debtor to pay the money to a third person at the creditor's death. The legal effect of such a direction, given without any thought of possible litigation and in reliance on the honor of the parties, and yet intended to create a binding

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The court refused to allow conjectural profits as the measure of damages, but took the more certain measure of the difference between the contract price and the normal rental value, in money. The court in the later case was evidently misled by a failure to notice the great difference in the circumstances of the two cases.

[19] See Shoemaker *v.* Acker, *supra*.

[20] See SEDGWICK, DAMAGES, 9 ed., § 1373.

[21] See *id.*, § 1383. The line between the two is not clear, and it is often hard to determine with which the courts are dealing. Thus, for the destruction of growing crops, some courts take the measure of damage to be the value of the crops when destroyed, to be estimated by taking the market value at maturity less the cost of producing; while others take the latter statement to be the actual measure of damage. *Cf.* also Cornelius *v.* Little, *supra*, with Harrell *v.* Johnson, *supra*.

[22] See WIGMORE, EVIDENCE, § 2575.

[23] There may be some question whether the decision in Turpin *v.* Jones does not make the matter *res judicata*. This certainly should not be the result.

obligation, is not wholly clear. If the words of the creditor can be fairly construed as declaring himself trustee of the debt for the intended donee, a valid trust will arise,[1] but his instructions can rarely be given this technical meaning. The tendency for equity to torture every legally incompleted gift into such a trust for the donee [2] has been definitely arrested.[3] The more natural meaning of the creditor's words, that the debtor is to be the trustee, cannot be given effect, for a debtor cannot be trustee of his own debt.[4] So the creditor's intention cannot usually be carried out by means of a trust.

But under the law of contracts the transaction may contain all the necessary elements of a binding obligation. In consideration of the creditor's discharge of the debt the debtor may promise the creditor to pay the donee, substituting a sole-beneficiary contract [5] for the original obligation, or the debtor may make his promise directly to the donee, thus bringing about a novation of creditors.[6] In both cases the donee acquires a direct right against the debtor. Apparently either of these principles is applicable to a recent Nebraska case [7] upholding this kind of a transaction. But the court rested its decision on the ground that there was a completed gift *inter vivos*.[8]

The general principle is that either a deed or a delivery of the property is essential for a legal gift.[9] A chose in action can be given by deed [10]

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[1] *Ex parte* Pye, 18 Ves. 140 (1811). See SCOTT, CASES, TRUSTS, 146 n; AMES, CASES, TRUSTS, 125 n; LEWIN, TRUSTS, 12 ed., 71; PERRY, TRUSTS, 6 ed., § 96.

[2] M'Fadden *v.* Jenkyns, 1 Phillips, 153 (1842); Eaton *v.* Cook, 25 N. J. Eq. 55 (1874); Morgan *v.* Malleson, L. R. 10 Eq. 475 (1870); Caylor *v.* Caylor's Estate, 22 Ind. App. 666, 52 N. E. 465 (1899).

[3] Milroy *v.* Lord, 4 DeG. F. & J. 264 (1862); Richards *v.* Delbridge, L. R. 18 Eq. 11 (1874); *In re* Ashman's Estate, 223 Pa. 543, 72 Atl. 899 (1909); Cardoza *v.* Leveroni, 233 Mass. 310, 123 N. E. 672 (1919). See SCOTT, CASES, TRUSTS, 151 n; AMES, CASES, TRUSTS, 130 n, 133 n.

[4] See Austin W. Scott, "The Progress of the Law: Trusts," 33 HARV. L. REV. 688.

[5] See 1 WILLISTON, CONTRACTS, §§ 360, 368.

[6] See AMES, LECTURES ON LEGAL HISTORY, 298, 6 HARV. L. REV. 184; 3 WILLISTON, CONTRACTS, §§ 1865, 1866.

[7] Dinslage *v.* Stratman, 180 N. W. 81 (1920). For a statement of the facts, see RECENT CASES, p. 672, *infra*.

[8] If there was a completed gift, the court properly held that the postponement of the enjoyment until the donor's death did not render the transfer void as testamentary. Tucker *v.* Tucker, 138 Ia. 344, 116 N. W. 119 (1908); Roepke *v.* Nutzmann, 95 Neb. 589, 146 N. W. 939 (1914); Innes *v.* Potter, 130 Minn. 320, 153 N. W. 604 (1915); Howard *v.* Hobbs, 125 Md. 636, 94 Atl. 318 (1915); Goodan *v.* Goodan, 184 Ky. 79, 211 S. W. 423 (1919). Nor would an otherwise valid gift be defeated by the fact that the enjoyment was contingent, as in Dinslage *v.* Stratman, *supra*, on the donor's death before the donee reached the age of eighteen. Neale *v.* Neales, 9 Wall. (U. S.) 1 (1869); Simer *v.* Flatt, 177 Pac. 545 (Okla.) (1918); Green *v.* Redmond, 132 Md. 166, 103 Atl. 431 (1918); Edgar *v.* Yant, 66 Colo. 599, 185 Pac. 252 (1919). And the fact that the gift in Dinslage *v.* Stratman, *supra*, was of only part of the debt is not fatal. Carpenter *v.* Soule, 88 N. Y. 251 (1882); McKenzie *v.* Harrison, 120 N. Y. 260, 24 N. E. 458 (1890); Holmes *v.* Holmes, 129 Mich. 412, 89 N. W. 47 (1902).

[9] Irons *v.* Smallpiece, 2 B. & Ald. 551 (1819); Cochrane *v.* Moore, 25 Q. B. D. 57 (1890); Gammon Theological Seminary *v.* Robbins, 128 Ind. 85, 27 N. E. 341 (1891). For the development of this principle, see Roscoe Pound, "Juristic Science and Law," 31 HARV. L. REV. 1053.

[10] Airey *v.* Hall, 3 Sm. & G. 315 (1856); Walker *v.* Bradford Old Bank, 12 Q. B. D. 511 (1884); *In re* Patrick, [1891] 1 Ch. 82; De Caumont *v.* Bogert, 36 Hun (N. Y.), 382 (1885); Matson *v.* Abbey, 141 N. Y. 179, 36 N. E. 11 (1894); Taylor *v.* Purdy, 151 Ky.

but can never be actually delivered. But where the chose in action is represented by a specialty, whether a negotiable [11] or a non-negotiable [12] instrument, a gift can be made by delivery of the specialty. A gift to the obligor can be effected with less formality. This can be accomplished by delivery of the instrument [13] or of a receipt for payment,[14] or, without delivery, by destruction of the instrument [15] or indorsement of payment upon it.[16] Some cases, however, seem to allow a gift to a third person by delivery of practically any written evidence of the chose in action.[17] And two recent New York cases [18] held that delivery of an informal written declaration of gift effected a valid gift. The Nebraska case goes a step further and holds that where there is no written evidence of the debt a gift is completed by an oral direction to the debtor in the presence of the donee.[19]

The real essential of a gift is the intent of the donor.[20] The donor must intend gratuitously to divest himself irrevocably of his rights in the property and to create a present interest in the donee.[21] And he

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82, 151 S. W. 45 (1912); Garrison *v.* Spencer, 58 Okla. 442, 160 Pac. 493 (1916); Curriden *v.* Chandler, 108 Atl. 296 (N. H.) (1919).

[11] Grover *v.* Grover, 24 Pick. (Mass.) 261 (1837); Clark *v.* Gurley, 48 Tex. Civ. App. 274, 106 S. W. 394 (1907). See THORNTON, GIFTS, § 271.

[12] Commonwealth *v.* Crompton, 137 Pa. 138, 20 Atl. 417 (1890); Martin *v.* McCullough, 136 Ind. 331, 34 N. E. 819 (1893); Shepard *v.* Shepard, 164 Mich. 183, 129 N. W. 201 (1910); Hall *v.* O'Brien, 218 N. Y. 50, 112 N. E. 569 (1916); Dirks *v.* Union Savings Ass'n, 40 S. D. 529, 168 N. W. 578 (1918). See SCOTT, CASES, TRUSTS, 155 n, 162, 163; AMES, CASES, TRUSTS, 155 n.

[13] Lanham *v.* Meadows, 72 W. Va. 610, 78 S. E. 750 (1913); Pyle *v.* East, 173 Ia. 165, 155 N. W. 283 (1915).

[14] Gray *v.* Barton, 55 N. Y. 68 (1873); Carpenter *v.* Soule, *supra;* McKenzie *v.* Harrison, *supra.*

[15] Gardner *v.* Gardner, 22 Wend. (N. Y.) 525 (1839); Denunzio's Receiver *v.* Scholtz, 117 Ky. 182, 77 S. W. 715 (1903).

[16] Ferry *v.* Stephens, 66 N. Y. 321 (1876). As to gifts by creation of a joint tenancy, see East, etc. Ass'n *v.* McKenzie, 87 N. J. Eq. 375, 100 Atl. 931 (1917); Marston *v.* Industrial Trust Co., 107 Atl. 88 (R. I.) (1919); Rice *v.* Bennington Bank, 108 Atl. 708 (Vt.) (1920).

[17] Jones *v.* Moore, 102 Ky. 591, 44 S. W. 126 (1898); *In re* Huggin's Estate, 204 Pa. 167, 53 Atl. 746 (1902); Claytor *v.* Pierson, 55 W. Va. 167, 46 S. E. 935 (1904); Davie *v.* Davie, 47 Wash. 231, 91 Pac. 950 (1907); Lipson *v.* Evans, 133 Md. 370, 105 Atl. 312 (1918); McGavic *v.* Cossum, 72 App. Div. 35, 76 N. Y. Supp. 305 (1902). But see Cook *v.* Lum, 55 N. J. L. 373, 26 Atl. 803 (1893).

[18] *In re* Cohn, 187 App. Div. 392, 176 N. Y. Supp. 225 (1919); Hawkins *v.* Union Trust Co., 187 App. Div. 472, 175 N. Y. Supp. 694 (1919).

[19] The court's language indicates that the presence of the donee's representative at the giving of the direction to the debtor was not necessary for a gift. The opinion emphasizes the clear intent to give and the donor's belief that the gift was complete. It amounts to a holding that no delivery is necessary.

[20] For a long time it was doubtful whether intent alone was not sufficient. See the principles laid down by Pollock, B., in Danby *v.* Tucker, 31 W. R. 578 (1883); and by Cave, J., in *In re* Ridgway, 15 Q. B. D. 447 (1885); overruled by Cochrane *v.* Moore, *supra.* See Leitch *v.* Diamond National Bank, 234 Pa. 557, 83 Atl. 416 (1912); Sullivan *v.* Hess, 241 Pa. 407, 88 Atl. 544 (1913). It is often said that the assent of both parties is necessary, but the assent of the donee is presumed. Martin *v.* McCullough, *supra;* Matson *v.* Abbey, 70 Hun, 475, 24 N. Y. Supp. 284, aff'd 141 N. Y. 179, 36 N. E. 11 (1894); Richards *v.* Wilson, 185 Ind. 335, 112 N. E. 780 (1916); McKinnon *v.* Bank, 82 So. 748 (Fla.) (1919). See THORNTON, GIFTS, § 86.

[21] Cook *v.* Lum, *supra;* Burns *v.* Burns, 132 Mich. 441, 93 N. W. 1077 (1903); Duryea *v.* Harvey, 183 Mass. 429, 67 N. E. 351 (1903); Bailey *v.* Orange Memorial Hospital, 102 Atl. 7 (N. J.) (1917); Brewer's Administrator *v.* Brewer, 181 Ky. 400, 205 S. W.

must manifest this intention objectively so that the law can deal with it. This is the basis of the requirement of a deed or delivery. Is a parol order to his debtor to pay another a sufficient manifestation of the creditor's donative intent? An oral gratuitous assignment of a chose in action is at least an authority to the donee to collect and to the debtor to pay the donee, but an authority is revocable and is revoked by death.[22] A distinction has been suggested [23] between an authority and an order, which latter was said to be irrevocable, but this does not seem to be supported by reason or authority.[24] In a case where the donative intent is very clear and where there is no tangible evidence of the chose in action to deliver, should an oral direction operate as an irrevocable transfer rather than a mere authority? Such a principle would secure the interest of owners in the free transfer of their property. A requirement of clear proof in each case of actual intent to give would tend to prevent fraud and unfounded claims. The slight difference in fact between an oral gratuitous declaration of trust and an oral declaration of gift is merely technical. The vast difference in their legal effect cannot be due to equally divergent interests.[25] These considerations tend to support the doctrine of the Nebraska case. But the law cannot secure every interest.[26] The greater interest in the general security of transactions and the prevention of fraud often requires a general rule of property law that leaves some interests of owners unsecured. And although wide inroads have been made on the strict requirement of delivery, it may be questioned whether an oral direction without more is not too informal to transfer title.[27] On the other hand, delivery of a written declaration of gift would seem to furnish the necessary proof of the donor's intent without imposing too cumbersome formalities on the transfer.[28]

CORROBORATIVE EVIDENCE. — "Witnesses are to be weighed, not counted." This is the general rule of the common law, in contradistinction to the numerical requirements of the civil [1] and of the canon law.[2] The statutory requirement of two witnesses in treason cases is almost

393 (1918); Huenink *v.* Heittbrink, 177 N. W. 796 (Neb.) (1920); Reynolds *v.* Thompson, 161 Ky. 772, 171 S. W. 379 (1914).

[22] See 1 WILLISTON, CONTRACTS, § 440.

[23] See George H. Balkam, "Payment of Bill of Exchange or Check by the Drawee after the Drawer's Death," 14 HARV. L. REV. 588.

[24] See John M. Zane, "Death of the Drawer of a Check," 17 HARV. L. REV. 104.

[25] See C. B. Labatt, "The Inconsistencies of the Laws of Gifts," 29 AM. L. REV. 361.

[26] See Roscoe Pound, "The Limits of Effective Legal Action," 3 AM. BAR ASS'N JOURN. 55, 27 INT. JOURN. OF ETHICS, 150.

[27] Van Cleef *v.* Maxfield, 103 Misc. 448, 171 N. Y. Supp. 333, aff'd 186 App. Div. 906, 172 N. Y. Supp. 923 (1918); Cohen *v.* Cohen, 107 Misc. 635, 177 N. Y. Supp. 180 (1919); Cardoza *v.* Leveroni, *supra*. But see Ebel *v.* Piehl, 134 Mich. 64, 95 N. W. 1004 (1903).

[28] Hawn *v.* Stoler, 208 Pa. 610, 57 Atl. 1115 (1904); Adams *v.* Merced Stone Co., 176 Cal. 415, 178 Pac. 498 (1917); Humphrey *v.* Ogden, 53 Colo. 309, 125 Pac. 110 (1912); *In re* Cohn, *supra;* Hawkins *v.* Union Trust Co., *supra*.

[1] See DIG. 22, 5, 12; COD. 4, 20, 4.

[2] See CORP. JUR. CANON., DECRET. GREG., lib. 2, tit. 20, *de testibus*, c. 23.